PP

v.

BADRON ZAMANUDDIN

HIGH COURT MALAYA, IPOH
VT SINGHAM J
[CRIMINAL APPEAL NO: 42-5-2004]
11 NOVEMBER 2004

CRIMINAL PROCEDURE: *Sentence - Adequacy of sentence - Two separate offences of rape of a child - 16 years imprisonment to run concurrently and three strokes of rotan - Principles of sentencing - Concurrent or consecutive - Deterrent sentence - Whether there were extenuating circumstances - Whether sentences ought to be enhanced*

The respondent in this appeal, who had pleaded guilty to two separate offences of rape of a 12-year old child (the respondent's niece) for the first offence and of the same child when aged 13 years and four months for the second offence, was convicted and sentenced to 16 years imprisonment and whipping of three strokes of the rotan for each offence by the learned sessions court judge. The sentences were ordered to run concurrently from the date of the respondent's arrest. The learned deputy public prosecutor, being dissatisfied with the order of the sentence to run concurrently and the inadequacy of the whipping, appealed against the decision of the learned sessions court judge, contending that: (i) there were two distinct offences even though the nature of the offence was the same; (ii) the sentence should be consecutive and not concurrent, and that the whipping be increased to 10 strokes of the rotan for each offence in order to be a deterrent sentence; and (iii) the learned sessions court judge had not taken into consideration the force used by the respondent on the child.

Held (allowing the appeal):

[1] In the instant appeal, the offences committed by the respondent did not arise out of the same transaction but were offences committed on separate dates and places. Upon perusal of both the amended charges as framed, the notes of proceedings and the facts of the case which revealed that the victim was forced to submit to sex with the respondent, the order of whipping of three strokes of the rotan on each charge was manifestly inadequate and ought to be increased to reflect the gravity of the offences, taking into account that the victim was a child and the respondent's own

niece. In the circumstances, the learned sessions court judge had erred in law and in fact, and her order for both sentences to run concurrently could not be maintained and ought to be altered so as to run consecutively. (pp 497 c, 498 g & 499 b)

[2] There were no extenuating circumstances apart from the respondent's plea of guilty and that he was a first-time offender. It has been said time and time again that each case depends upon its own set of facts, the nature of the offence committed by the accused, the background and circumstances of the case and in the case of statutory rape, the relationship between the victim and the accused. There was no universal application that a first-time offender who had pleaded guilty must, as of right, receive a lenient sentence. Hence, this was an appropriate case for the court to interfere with the order of whipping with a view to enhance the whipping to six strokes of the rotan for each offence as there were no strong mitigating factors in all the circumstances and facts of the case. (pp 502 a-b & 503 g)

Case(s) referred to:

Abdul Karim v. Reg [1954] 20 MLJ 86 ***(refd)***
Abu Seman v. PP [1982] 2 MLJ 338 ***(refd)***
Ang Chai Seng v. PP [2000] 1 CLJ 213 HC ***(refd)***
Attorney Generals' References (Nos: 120, 91 and 119 of 2002) [2003] 2 All ER 955 ***(foll)***
Bhandulananda Jayatilake v. PP [1982] 1 MLJ 83 ***(refd)***
DR Garner v. PP [1973] 1 MLJ 106 ***(refd)***
Hashim Pawanchee & Anor v. PP [1988] 2 MLJ 66 ***(refd)***
Hj Johari Hj Abd Karim v. PP [1989] 2 MLJ 276 ***(refd)***
PP v. Chung Kwong Huah [1981] 1 MLJ 316 ***(refd)***
PP v. Govindan Chinden Nair [1998] 2 CLJ 370 HC ***(foll)***
PP v. Jafa Daud [1981] 1 CLJ 315 ***(foll)***
PP v. Lee Tak Keong [1989] 1 MLJ 307 ***(foll)***
PP v. Loo Choon Fatt [1976] 2 MLJ 256 ***(foll)***
PP v. Ng Chong Wan [1988] 1 CLJ 833; [1988] 2 CLJ (Rep) 278 HC ***(refd)***
PP v. Teh Ah Cheng [1976] 2 MLJ 186 ***(refd)***
PP v. Wong Kok Sein & Ors [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630 HC ***(refd)***
PP v. Yap Huat Heng [1986] 1 CLJ 81; [1986] CLJ (Rep) 645 HC ***(foll)***
Raja Izzuddin Shah v. PP [1979] 1 MLJ 270 ***(refd)***
Reg v. Blake [1962] 2 QB 377 ***(refd)***
Reg v. Davies [1978] 67 Cr App R 207 ***(refd)***
Reg v. Sargeant [1974] 60 Cr App R 74 ***(refd)***
Rex v. Grondkowski [1946] 1 All ER 560 ***(refd)***
Sau Soo Kim v. PP [1975] 2 MLJ 134
Sim Gek Yong v. PP [1995] 1 SLR 537 ***(refd)***

Tan Bok Yeng v. PP [1972] 1 MLJ 214 ***(foll)***
Tan Lay Chen v. PP [2000] 4 CLJ 492 ***(refd)***
The Queen v. Cutbush & Another [1867] LR 2 QB 329 ***(foll)***

Legislation referred to:
Penal Code, s. 376B

For the appellant - Abdul Rahman Putera Taha DPP
Respondent in person

Reported by Suresh Nathan

JUDGMENT

VT Singham J:

In this case, the respondent had pleaded guilty to two separate offences of rape on a child aged 12 years (his niece) for the first offence and the same child when aged 13 years and 4 months old for the second offence, and punishable under s. 376B of the Penal Code. He was convicted and sentenced to 16 years' imprisonment and ordered whipping of 3 strokes of the rotan on 19 February 2004 by the Sessions Court, Ipoh for each offence. The sentences were ordered to run concurrently from the date of his arrest which was on 13 February 2004. The learned Deputy Public Prosecutor was dissatisfied with the order of the sentence to run concurrently and that the sentence of whipping was inadequate. Hence, this appeal by the learned Deputy Public Prosecutor.

The charges against the respondent in respect of the instant appeal is as follows:

Pertuduhan Pindaan Pertama

Bahawa kamu pada jam lebih kurang 2.00 pagi dalam bulan November 2001 di No. 76, Hala Pengkalan Timur 30, Taman Pasir Putih Selatan Ipoh di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan telah dengan sengaja melakukan sumbang mahram dengan melakukan persetubuhan dengan anak saudara kamu sendiri, Nurul Ain Binti Zainal KPT 891120-08-5400 pada ketika itu berumur 12 tahun, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 376B Kanun Kesiksaan.

Pertuduhan Pindaan Kedua

Bahawa kamu pada jam lebih kurang 3.00 pagi dalam bulan Mac 2003 di rumah Lot 32373, Kampong Changkat Jering, Kuala Dipang, Jiram, Kampar di dalam Daerah Kinta, di dalam Negeri Perak Darul Ridzuan telah dengan sengaja melakukan sumbang mahram dengan melakukan persetubuhan dengan anak saudara kamu sendiri, Nurul Ain Binti Zainal KPT 891120-08-5400 pada ketika itu berumur 13 tahun, oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 376B Kanun Kesiksaan.

On 16 June 2004, when the appeal came up before this court, the learned Deputy Public Prosecutor submitted as follows:

(1) there are two distinct offences even though the nature of the offence was the same and referred to the case of *Public Prosecutor v. Yap Huat Heng* [1986] 1 CLJ 81; [1986] CLJ (Rep) 645;

(2) following *Public Prosecutor v. Yap Huat Heng*, the sentence should be consecutive and not concurrent and urged upon this court to review the sentence and submitted that the whipping be increased to 10 strokes of the rotan for each offence as there was force used by the respondent and urged the court for a deterrent sentence;

(3) the learned Sessions Court Judge did not take into consideration the force used by the respondent on the child and this was not stated in the grounds of judgment.

In opposing the appeal, the respondent submitted as follows:

(1) he did not force the victim and it was done with consent;

(2) he urged this court to reduce the sentence as he was old and had to look after his elder sisters. However, he conceded that he did not appeal against the sentence;

(3) the facts which were read out to him did not state that he forced upon the victim;

(4) he was 39 years old, married and divorced and his child of two months old had passed away;

(5) the victim came close to him and he could not control his urge for sex;

(6) he was employed as a security guard at Hong Leong Bank and urged upon the court to allow the sentence to run concurrently.

In reply, the learned Deputy Public Prosecutor urged upon this court to increase the whipping from 3 to 6 strokes of the rotan and to order the sentence to run consecutively.

Decision Of This Court

On going through the Record of Appeal which included both the amended charges and the facts of the case which was admitted by the respondent, this court found that both the offences were committed on two separate dates and at two different places, the first offence being in November 2001 at/about 2am

in Ipoh and the second offence in March 2003 at/about 3am in Kampar and both the offences were committed on the same victim, the niece of the respondent. On being questioned by this court, the respondent said that the victim is his niece. This court also found from the facts of the case that the victim was forced to submit to sex with the respondent and the victim had resisted on both occasions.

This court is of the view that when two or more distinct offences had been committed by the accused as in the instant case, on two separate dates and at two different places although on the same victim, the sentence should be ordered to run consecutively as the offences were not committed in the same transaction. However, each case is depended on the set of its own facts, circumstances and the age of the victim. In the instant appeal, the offences committed by the respondent did not arise out of the same transaction but were offences committed on separate dates and places. In fact, the learned Sessions Court Judge erred on the facts where she had stated in her grounds of judgment that both the offences were committed on the same date and time and this could have clouded her mind when she ordered the sentences to run concurrently.

In *Public Prosecutor v. Jafa bin Daud* [1981] 1 CLJ 315 at p. 316, His Lordship Mohamed Azmi J (as he then was) said:

> A "sentence according to law" means that the sentence must not only be within the ambit of the punishable section, but it must also be assessed and passed in accordance with established judicial principles. *In assessing sentence, one of the main factors to be considered is whether the convicted person is a first offender. It is for this purpose that before passing sentence, a Magistrate is required to call for evidence or information regarding the background, antecedent and character of the accused.* (emphasis added)

In considering whether the sentences imposed by the Sessions Court should run concurrently or consecutively, this court took into account:

(i) that the offence of rape committed by the respondent on a child aged 12 years in respect of the first charge and as for the second charge on the same child then 13 years and 4 months old was clearly a distinct and separate offence and did not arise out of the same transaction;

(ii) In *Public Prosecutor v. Yap Huat Heng* [1985] 2 MLJ 414 at p. 416, His Lordship Shaikh Daud J (as he then was) said:

> Where two or more distinct offences had been committed, sentences of imprisonment should not be made to run concurrently. It should only be made concurrent when an offender had been convicted of a principal and a subsidiary offence. In all other cases sentences should be made to run consecutively.
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> (See *Faulkner* [1972] 56 Cr. App R 594, *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134, *R v. Skinner* [1986] Cr. App. R. (S) 166, Haji *Johari Bin Haji Abd Karim v. Public Prosecutor* [1989] 2 MLJ 276 and *Kanagasuntharam v. Public Prosecutor* [1992] 1 SLR 81 at p. 83).

(iii) In *The Queen v. Cutbush And Another* [1867] LR 2 QB 329, Cockburn, CJ said:

> ... as right and justice require, when a man has been guilty of separate offences, for each of which a separate term of imprisonment is a proper form of punishment, that he should not escape from the punishment due to the additional offence, merely because he is already sentenced to be imprisoned for another offence, and as it would be contrary to public policy and expediency that he should so escape with but one punishment; (emphasis by this court)

(iv) (see also *Sau Soo Kim v. Public Prosecutor* [1975] 2 MLJ 134, *Abu Seman v. Public Prosecutor* [1982] 2 MLJ 338, *Hashim bin Pawanchee & Anor. v. Public Prosecutor* [1988] 2 MLJ 66, *Public Prosecutor v. Wong Kok Sein & Ors* [1988] 1 CLJ 873; [1988] 2 CLJ (Rep) 630, *Public Prosecutor v. Ng Chong Wan* [1988] 1 CLJ 833; [1988] 2 CLJ (Rep) 278 and *Haji Johari bin Haji Abd Karim v. Public Prosecutor* [1989] 2 MLJ 276).

(v) the facts of the case in respect of both the offences of rape was committed by the respondent on the victim at the wee hours when the victim was in the bedroom.

Upon perusal of both the amended charges as framed, the notes of proceedings and the facts of the cases, this court is of the view that the order of whipping of 3 strokes of rotan on each charge is manifestly inadequate and ought to be increased to reflect the gravity of the offences and taking into account that the victim was a child and the respondent's own niece. While the respondent is concerned of his two elder sisters whom he has to take care, this court cannot disregard the physiological trauma, embarrassment and the despicable and shameful crime he has committed on an innocent child, 12 years old as for the first charge and 13 years and 4 months old in respect of the second

charge at the time of the commission of the offences and the fact that the victim was his own niece who generally in our culture is looked upon as a father.

In the circumstances, the learned Sessions Court Judge had erred in law and on the facts and the order of the learned Sessions Court for both the sentences to run concurrently cannot be maintained and ought to be altered so as to run consecutively.

On the other hand, even if the victim had consented as claimed by the respondent which is immaterial as it is statutory rape and contrary to the facts of the case which he had admitted at the Sessions Court, he should not have taken advantage of the situation but instead should have resisted the offences and given her good advice. In fact, the facts of the case disclosed that the respondent had gone into the bedroom of the victim during wee hours when all the family members were expected to be asleep and committed the disgusting act. In Attorney Generals' References (Nos: 120, 91 and 119 of 2002) [2003] 2 All ER 955, under held it is stated:

> In all cases of sexual interference, whether amounting to rape or not, it was necessary to take into account all the degree of harm to the victim; the level of the offender's culpability; and the level of risk to society posed by the offender. In all classes of sexual offences, it was also necessary to deter others from acting in a similar fashion. Moreover, before passing a lighter sentence because the offences were stale, the court should weigh the impact on the victim ... (emphasis added)

Generally, the aim of deterrence is two fold, one is to deter the offender himself from committing the offence in the future and the other is to deter other would be offenders from committing the similar offence. In *Tan Bok Yeng v. Public Prosecutor* [1972] 1 MLJ 214, His Lordship Sharma J said:

> I am quite aware that the law does provide for a lesser sentence or no sentence at all imposed upon persons of young age. There has, however, emerged in recent years in our society certain species of crimes which the alacrity of mind and body, the dare, dash and defiance of the youth alone is capable of performing and producing. *Law cannot, in my view, remain merely a static and a meaninglessly passive, if ornamental and an orthodox instrument of justice, ineffective in its results and application. The social needs of the times have to be met and effectively met.* It is not merely the correction of the offender which is the prime object of punishment. The considerations of public interest have also to be borne in mind. *In certain types of offences a sentence has got to be deterrent so that others who are like-minded may be restrained from becoming a menace to society.* (emphasis added)

Public interest and justice demands that the court must show its abhorrence and one of the ways was to impose a deterrent sentence. People who commit sexual offences on children and on their own children or blood relatives deserve no mercy from this court. Public interest must be reflected in the sentence imposed by the court to deter other would be offenders especially in cases involving sexual offences on children more so when the victim is a child and blood relative, where as a result of the heinous crime not only the victim has to go through a traumatic experience of the unpleasant experience but that feeling is imposed and shared by the parents as well.

This court has considered the rampancy and the plethora of sexual offences committed on young children by ruthless men and blood relatives and crimes of violence which are reported almost daily in the Newspapers which cannot be disregarded and society, which is the ultimate guardian of decency, expects the court to take a serious view of this despicable crime so as not to impose a "too-lax sentence". In *Public Prosecutor v. Chung Kwong Huah* [1981] 1 MLJ 316-317, His Lordship Chan J said:

> … the time has come for the courts to show their disapproval by acknowledging that offences of this kind are grave and serious crimes, and that those who indulge in them must expect a severe sentence.

In *Public Prosecutor v. Teh Ah Cheng* [1976] 2 MLJ 186, His Lordship Abdoolcader J (as he then was) considered both the deterrence and prevention as important factors and said:

> … that in the light of the appalling increase in crimes involving violence … **society is crying out 'enough is enough' and is no longer in any mood to tolerate such offenders.** (emphasis added)
>
> Deterrence in this case would be that of the respondent and likely offenders similarly inclined …

This court has also considered and it must be observed that there is no automatic rule that a guilty plea on its own entitles an accused to a lesser punishment as this is depended on the circumstances and facts of each case and this was not considered by the learned Sessions Court Judge. (See *Sim Gek Yong v. Public Prosecutor* [1995] 1 SLR 537, *Public Prosecutor v. Govindan Chinden Nair* [1998] 2 CLJ 370 and *Tan Lay Chen v. Public Prosecutor* [2000] 4 CLJ 492). A guilty plea ought to be considered in favour of the accused only when all other factors and the circumstances surrounding the commission of the offence justify such a consideration. In the instant appeal, it cannot be overlooked that the respondent seemed to be a persistent offender in committing rape on a child who would have looked upon

him as a father or guardian and has the same pattern or *modus operandi* in indulging himself in this distasteful act which is devastating and outrageous sexual offences. In the instant appeal, the need to protect public interest and safety outweighs the plea of guilt in order to grant a lenient sentence.

In *Rex v. Grondkowski* [1946] 1 All ER 560 at p. 561, Lord Goddard said:

> The judge must consider the interests of justice as well as the interests of the prisoners. It is too often nowadays thought, or seems to be thought, that the interests of justice means only the interests of the prisoners.

In *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257, His Lordship Hashim Yeop A. Sani said:

> ... The mitigation submitted by a convicted person will also normally bring up problems of family hardship and the other usual problems of living. In such a situation the courts might perhaps find it difficult to decide as to what sentence should be imposed so that the convicted person may not be further burdened with additional hardship. This in my view is a wrong approach. The correct approach is to strike a balance, as far as possible, between the interests of the public and the interests of the accused …

In *Reg. v. Davies* [1978] 67 Cr. App. R. 207 at p. 209, Lawton CJ said:

> We have had to say in this Court time and time again in the past that hardship to families is not a matter which in the ordinary way we can take into consideration by way of reducing sentence.

In *Abdul Karim v. Reg* [1954] 20 MLJ 86, Brown Acting CJ said:

> In the matter of punishment, the "type of offence" is the concern of the Legislature, which has provided the maximum punishment which can be inflicted for a serious offence of that type. *The particular offence, and the particular offender, are the concern of the Court, whose business it is to decide what punishment is merited upon the facts of the individual case within the limits which the Legislature has provided.* Any tendency to standardise punishment for any type of offence is to be deplored because it means that the individual offender is being punished not upon the facts of his particular case but because he has committed an offence of that type. This tendency is particularly to be resisted in imposing punishment for an offence for which the Legislature has not left a wide field of discretion to the Court. (emphasis added)
>
> … in considering whether a prison sentence should be imposed in the case of a first offender, the facts of the case must be carefully studied and the gravity assessed according to the 'yard stick' afforded by the Legislature in providing a maximum of 4 months imprisonment for a first offence.

In the instant appeal, this court did not find any extenuating circumstances apart from the respondent's plea of guilty and that he was a first offender. It has been said time and time again that each case depends upon its own set of facts, the nature of the offence committed by the accused, the background and the circumstances of the case, in the case of statutory rape, the relationship between the victim and the accused and there is no universal application that a first time offender and who has pleaded guilty must as of right receive a lenient sentence and this was not considered by the learned Sessions Court Judge. His Lordship Hashim Yeop A. Sani J (as he then was) in *Public Prosecutor v. Loo Choon Fatt* [1976] 2 MLJ 256 at p. 257 said:

> … Each case has to be determined on its own merits. But in every case the courts must be realistic and rational.

In *Reg. v. Blake* [1962] 2 QB 377 at p. 383, Hilbery J said:

> It is of the highest importance, perhaps particularly at the present time, that such conduct should not only stand condemned, should not only be held in utter abhorrence by all ordinary men and women, but should receive, when brought to justice, the severest possible punishment. This sentence had a threefold purpose**. It was intended to be punitive, it was designed and calculated to deter others, and it was meant to be a safeguard to this country.** (emphasis added)

In *Reg v. Sargeant* [1974] 60 Cr. App. R. 74, Lawton CJ said:

> … society, through the courts, must show its abhorrence of particular types of crime, and the only way in which the courts can show this is by the sentences they pass. The courts do not have to reflect public opinion. On the other hand courts must not disregard it. Perhaps the main duty of the court is to lead public opinion. (emphasis added)

In *Public Prosecutor v. Lee Tak Keong* [1989] 1 MLJ 307, His Lordship Zakaria Yatim J (as he then was) said:

> … the court must take into consideration the element of public interest. This means that the court must impose a deterrent sentence not only to deter the respondent from committing the same offence again but to deter others from committing the same type of crime … the court must also consider society's abhorrence of this type of crime.

> (See *Public Prosecutor v. Tan Eng Hock* [1970] 2 MLJ 15, *Lee Chow Meng v. Public Prosecutor* [1976] 1 MLJ 287, *Cheong Ah Cheow v. Public Prosecutor* [1985] 2 MLJ 257, *Ooi Sim Yim v. Public Prosecutor* [1990] 1 MLJ 88, *Ong Lai Kim v. Public Prosecutor* [1991] 3 MLJ 111, *Public Prosecutor v. Ooi Wang San* [1998] 2 MLJ 765).

On the other hand, this court has also considered the case of *Raja Izzuddin Shah v. Public Prosecutor* [1979] 1 MLJ 270, where His Lordship Hashim Yeop A. Sani J (as he then was) said:

> … No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice. (see *Public Prosecutor v. Doraigunaraju a/l Krishnan* [1993] 3 CLJ 664)

Be that as it may, this court is mindful first that the courts are loathed to interfere with the sentence passed by the lower court unless it was manifestly inadequate or wrong in law or the court did not observe established judicial and sentencing principles. (see *Bhandulananda Jayatilake v. Public Prosecutor* [1982] 1 MLJ 83 and followed in *Ang Chai Seng v. PP* [2000] 1 CLJ 213). In the instant appeal, the learned Sessions Court Judge, having stated that the public interest must be taken into consideration in respect of this type of cases and a deterrent sentence ought to be imposed, however had failed to take into account that the victim was still a child at the material time and was the respondent's niece and she had failed to reflect her thoughts on the sentence of whipping that she had imposed on the respondent. On considering the nature of the offence, the age of the victim and the fact she was the respondent's niece, the facts in the instant appeal and the justice of the case, this court is of the view that the whipping of 3 strokes of the rotan for a persistent offender of the same nature of the offence imposed by the Sessions Court was manifestly inadequate. This court is therefore of the view that the whipping of 3 strokes of the rotan imposed by the learned Sessions Court Judge was not only manifestly inadequate but is not suited to the facts which led to the offence in the instant appeal and after considering the background of the respondent and bearing in mind that sexual offences on children by their father and relatives has alarmingly increased recently and is rampant.

This court therefore took the view that this was an appropriate case for the court to interfere with the order of whipping with a view to enhance the whipping to 6 strokes of the rotan for each offence as this court found no strong mitigating factors in all the circumstances and facts of the case. (See *D.R. Garner v. Public Prosecutor* [1973] 1 MLJ 106 at p. 107). In the circumstances, the appeal by the learned Deputy Public Prosecutor against the sentence is allowed. Accordingly, the order that both the sentences of imprisonment to run concurrently as imposed by the learned Sessions Court Judge is set aside and substituted with an order for the sentences of imprisonment to run consecutively and the whipping was ordered to be increased to 6 strokes of the rotan for each offence.